ORAL ARGUMENT SCHEDULED FOR MARCH 16, 2001

No. 00-7149

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ROBERT L. STEVENSON,

Plaintiff-Appellant

v.

DISTRICT OF COLUMBIA METROPOLITAN
POLICE DEPARTMENT, ET AL.,

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FINAL BRIEF FOR THE UNITED STATES AS INTERVENOR

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. *Parties.* All parties appearing before the district court and in this Court are listed in the Brief for the Appellant.

B. *Rulings Under Review.* References to the rulings at issue appear in the Brief for the Appellant.

C. *Related Cases.* Related cases are listed in the Brief for the Appellant.

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GLOSSARY

APA refers to the Administrative Procedure Act, 5 U.S.C. 301, et seq.

D.C. refers to the District of Columbia

DOJ refers to the United States Department of Justice

FOIPA refers to the Freedom of Information and Privacy Act, 5 U.S.C. 552

MPD refers to defendants-appellees District of Columbia Metropolitan Police Department, the City of the District of Columbia, and individual police officers

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STATEMENT OF THE ISSUE

Whether the district court acted properly when denying plaintiff's motion to enforce a third-party subpoena seeking disclosure of documents created by the Department of Justice in the context of an ongoing investigation of police misconduct.

STATUTES AND REGULATIONS

The applicable statutes are the Administrative Procedure Act, 5 U.S.C. 301, 702 and 706, and the Freedom of Information and Privacy Act, 5 U.S.C. 552(b). The applicable regulations are 28 C.F.R. Part 16, Subpart B. These statutes and regulations are attached in an addendum to this brief.

STATEMENT OF THE CASE

On November 14, 1997, appellant Robert L. Stevenson (Stevenson) brought a civil rights action against the District of Columbia Metropolitan Police Department, the City of the District of Columbia, and individual police officers (collectively referred to as MPD), alleging the use of excessive force by police officers in violation of 42 U.S.C. 1983 (R. 1, J.A. 23).[1] Stevenson's suit stems from a shooting incident on March 7, 1996, where Stevenson was shot four times by police officers. In 1999, the United States Department of Justice (DOJ) began

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[1] "R. __" refers to items on the district court docket sheet. "Stevenson Br. __" refers to pages in the brief filed by plaintiff-appellant Stevenson. "Plt. Emerg. Mot., Exh. __" refers to the exhibits attached to Plaintiff's Emergency Motion For Enforcement Of Subpoena (filed May 1, 2000), which is reflected as item 125 on the district court docket sheet. "Tr. ___ (May 2, 2000, a.m.)" refers to the transcript of the district court hearing held on the morning of May 2, 2000. "Tr. ___ (May 2, 2000, p.m.)" refers to the transcript of the district court hearing held on the afternoon of May 2, 2000. "J.A. ___" refers to pages in the deferred Joint Appendix.

investigating MPD's uses of force under 42 U.S.C. 14141, which authorizes DOJ to investigate and bring litigation against law enforcement agencies that exhibit a pattern or practice of unlawful conduct (Tr. 5-6 (May 2, 2000, a.m.), J.A. 143-144). The Special Litigation Section of the Department of Justice's Civil Rights Division is responsible for conducting the Section 14141 investigation of MPD. Stevenson served a subpoena on Steven H. Rosenbaum, Chief of the Special Litigation Section, seeking disclosure of, *inter alia*, an internal DOJ-created document that was compiled as part of DOJ's investigation. The DOJ refused to submit to that aspect of the subpoena. The district court held a hearing, and denied Stevenson's motion to enforce the subpoena with respect to the internal DOJ document.

STATEMENT OF FACTS

1. In January 1999, following numerous questionable shooting incidents reported in the Washington Post, D.C. Police Chief Charles Ramsey requested that DOJ review MPD's uses of force (Tr. 5-6 (May 2, 2000, a.m.), J.A. 143-144). The Department granted that request, and shortly thereafter commenced an investigation pursuant to 42 U.S.C. 14141 (Tr. 5-6 (May 2, 2000, a.m.); J.A. 143-144). DOJ is reviewing MPD uses of force that occurred in the District of Columbia between 1994 and 1999. The shooting incident involving Stevenson

falls within the scope of DOJ's investigation.

On April 5, 2000, Stevenson filed a request for DOJ records on the March 7, 1996 shooting under the Freedom of Information and Privacy Act (FOIPA) (Plt. Emerg. Mot., Exh. A, J.A. 77-78). Shortly thereafter Stevenson was informed by DOJ that there would be some delay in providing a response (Plt. Emerg. Mot., Exhs., B & C, J.A. 79-81). On April 26, 2000, prior to receiving a response to his FOIPA request, Stevenson served a subpoena on Steven H. Rosenbaum, Chief of the Special Litigation Section of the Civil Rights Division, seeking "all documents, records, correspondence, memoranda or computer-stored information pertaining to the U. S. Department of Justice's review of police use of force and use of force investigations in the District of Columbia" (Plt. Emerg. Mot., Exh. D, J.A. 82-84). The next day, counsel for the United States informed Stevenson that DOJ objected to disclosure of any documents under the subpoena on the ground that disclosure would reveal investigatory records compiled for law enforcement proceedings, and that DOJ's regulations (28 C.F.R. Part 16, Subpart B) prohibited disclosure of that material when the Department was not a party to the litigation absent compliance with the regulations (Plt. Emerg. Mot., Exh. E, J.A. 85-86). Counsel for the United States stated that the "results and conclusions" from DOJ's investigation of MPD

have "not been reviewed * * * by any senior DOJ official, and hence are at best preliminary and tentative" (Plt. Emerg. Mot., Exh. E, J.A. 86). On May 1, 2000, Stevenson filed an emergency motion to enforce the subpoena (R. 125; J.A. 68). The district court judge conducted a hearing on the emergency motion the next day, on May 2, 2000 (J.A. 139, 168).

2. At the hearing, the district court, along with counsel for the United States, reviewed *in camera* two sets of documents. The first set of documents consisted of MPD records concerning the March 7, 1996, shooting incident involving Stevenson that had been voluntarily provided to DOJ by MPD. The United States did not object to the disclosure of these documents, and the district court ordered that these documents be disclosed (R. 129, Order at 1, J.A. 119).

The second set consisted of a five-page DOJ document on the March 7 shooting incident involving Stevenson that was maintained in the agency's files. The document was created by DOJ attorneys and experts and included their tentative, preliminary review of the use of force against Stevenson. The first page was a copy of a computer printout, and the second through fourth pages were a completed checklist and questionnaire on the incident. DOJ's expert's and/or attorney's observations regarding the incident, and brief, preliminary, and tentative

conclusions on the existence or nonexistence of the excessive use of force by MPD were set out in six lines on the fourth and fifth pages of the document. This kind of printout and questionnaire is being completed for a random sample of uses of force involving D.C. police officers between 1994 and 1999, as part of DOJ's 42 U.S.C. 14141 investigation. That investigation is ongoing and has not yet been completed (Tr. 5-8 (May 2, 2000, a.m.), J.A. 143-146).

The United States argued that the DOJ-created document could not be disclosed pursuant to 28 C.F.R. Part 16.26, which prohibits the production or disclosure of any DOJ material that would "reveal investigatory records compiled for law enforcement purposes" and "interfere with enforcement proceedings or disclose investigative techniques" (Plt. Emerg. Mot., Exh. E, J.A. 85; Tr. 5-9 (May 2, 2000, a.m.), J.A. 143-147). The district court denied Stevenson's motion to enforce the subpoena with respect to this second document, ruling that it "do[es] not identify any fact witness or otherwise provide any lead to admissible evidence" (R. 129, Order at 2, J.A. 120; see also Tr. 29 (May 2, 2000, p.m.), J.A. 178).[2]

3. A jury trial began the following day, May 3, and continued to May 11,

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[2] By orders dated July 19, 2000, and August 1, 2000, the district court ruled that the transcript of the ex parte portion of the May 2, 2000 hearing be sealed, and that the remaining portion of the transcript of proceedings that occurred in open court remain unsealed and available to the parties (R. 152, 153, J.A. 122, 123).

2000. On May 11, the jury reached a verdict in favor of defendants (R. 134). Stevenson appealed (R. 142, J.A. 97). In his brief as appellant, Stevenson argues, *inter alia*, that the district court erred in denying discovery of the DOJ-created document (Stevenson Br. 33).

STANDARDS OF REVIEW

The Department of Justice's refusal to disclose an internal investigatory document based on regulations promulgated pursuant to the Administrative Procedure Act, 5 U.S.C. 301 *et seq.*, should be reviewed to determine whether its decision was arbitrary, capricious, or not in accordance with the law. *D&F Alfonso Realty Trust* v. *Garvey*, 216 F.3d 1191, 1194 (D.C. Cir. 2000). The district court's ruling on a subpoena for the production of documentary evidence should be reviewed only for arbitrariness. *In re Subpoena*, 967 F.2d 630, 633 (D.C. Cir. 1992).

SUMMARY OF ARGUMENT

The district court was correct to deny plaintiff Stevenson's motion to enforce his subpoena and refuse to order disclosure of a document created by DOJ in the context of its investigation of the MPD. The internal DOJ document consists of five pages created by the Department on the March 7, 1996, shooting incident

involving Stevenson that was maintained in the agency's files as part of its Section 14141 investigation of MPD. The document contains a computer printout, checklist, and questionnaire on the incident. The observations of DOJ experts and attorneys are contained at the end of the document, as is a brief, preliminary, and tentative conclusion on the existence or nonexistence of the excessive use of force.

Stevenson can only seek to compel production of an internal DOJ document in a case where the United States is not a party to the proceeding pursuant to the express waiver of sovereign immunity contained in the Administrative Procedure Act (APA), 5 U.S.C. 702. DOJ regulations prohibit the disclosure of internal agency documents that would "reveal investigatory records compiled for law enforcement purposes, and would interfere with enforcement proceedings." 28 C.F.R. 16.26(b)(5). DOJ's refusal to submit to the subpoena and produce the investigatory document was not arbitrary or capricious because it was based on the agency's regulations prohibiting such disclosure in proceedings where the United States is not a party, and therefore DOJ's decision not to turn over the document was consistent with the standards of the APA.

Furthermore, the DOJ-created document is protected by the deliberative process and law enforcement privileges, which are inherent in the regulations

governing disclosure of DOJ documents. First, the document is protected as deliberative process because it is "predecisional" and "deliberative," as it contains only a preliminary review of facts involved in this case and the agency has not yet made a final determination on MPD's use of force here. Second, the document is protected by the law enforcement privilege because it results from a current, ongoing investigation, pursuant to 42 U.S.C. 14141, that focuses on specific acts that could result in civil sanctions.

Finally, the district court correctly refused to permit disclosure of the internal DOJ document because it would not lead to additional facts. The document of which Stevenson seeks disclosure was based solely on factual information provided to DOJ by MPD; the same information was provided by MPD to Stevenson prior to his trial. The only additional information contained in the document are brief, tentative, and preliminary conclusions as to the existence or nonexistence of the use of excessive force on Stevenson. These tentative conclusions were made by DOJ attorneys and experts who are engaged in the investigation of MPD, but have not been reviewed by senior officials within the Department as is necessary prior to reaching a final decision on the legality of MPD's policies and practices.

ARGUMENT

THE DISTRICT COURT WAS NOT ARBITRARY IN DENYING THE MOTION TO ENFORCE THE SUBPOENA

A. *The United States' Refusal To Disclose Its Internal Document Was In Compliance With Its Tuohy Regulations And Was Not Arbitrary Or Capricious*

A federal court litigant seeking to obtain production of documents from a non-party federal agency by means of a federal subpoena can do so only pursuant to the express waiver of sovereign immunity under the Administrative Procedure Act. See *Houston Business Journal* v. *Comptroller of the Currency*, 86 F.3d 1208, 1212 (D.C. Cir. 1996); *Al Fayed* v. *Central Intelligence Agency*, 229 F.3d 272, 275-276 (D.C. Cir. 2000); *United States EPA* v. *General Electric Co.*, 197 F.3d 592, 598-599 (2d Cir. 1999); see also *Comsat Corp.* v. *National Science Found.*, 190 F.3d 269, 274 (4th Cir. 1999); *Edwards* v. *U.S. Dep't of Justice*, 43 F.3d 312, 315 (7th Cir. 1994); but see *Exxon Shipping Co.* v. *United States Dep't of Interior*, 34 F.3d 774 (9th Cir. 1994).[3] When the "government is not a party, the APA

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[3] In *Exxon Shipping*, the Ninth Circuit ruled that the district court should apply federal rules of discovery when deciding on discovery requests made against a federal agency, whether or not the United States is a party to the underlying action. 34 F.3d 774. The Second and Fourth Circuits have, however, expressly disagreed with that approach and held that the "only identifiable waiver of sovereign immunity that would permit a court to require a response to a subpoena to an action in which the government is not a party is found in the APA." *General Electric,* 197

provides the sole avenue for review of an agency's refusal to permit its employees to comply with subpoenas." *Comsat Corp.*, 190 F.3d at 274; see also *Smith* v. *Cromer*, 159 F.3d 875, 881 (4th Cir. 1998), cert. denied, 528 U.S. 826 (1999). Citing to *General Electric* and *Comsat Corp.*, *supra*, this Court has acknowledged that there is a "standard presumption" that "[the APA,] 5 U.S.C. 702[,] [is] the only applicable waiver of sovereign immunity" and "review of an agency's response to a subpoena proceeds as an ordinary APA case." *Fayed*, 229 F.3d at 276; see also *Houston Business Journal*, 86 F.3d at 1212.

The APA waives the government's sovereign immunity from suit and permits federal court review of final agency actions, when the relief sought is other than money damages and plaintiff has stated a claim "that an agency or other officer or employee thereof acted or failed to act in an official capacity." 5 U.S.C. 702. The agency's final action can only be set aside if found "arbitrary, capricious, [an] abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. 706. DOJ's refusal to submit to the subpoena and produce the investigatory document sought in this case was not arbitrary or capricious because it was firmly based on the agency's regulations governing production or disclosure of DOJ files

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F.3d at 598; *Comsat Corp.*, 190 F.3d at 277.

in federal and state proceedings. In *United States ex rel. Touhy* v. *Ragen*, the Supreme Court held that an agency employee could not be held in contempt when he refused to submit to a subpoena "on the ground that the subordinate is prohibited from making such submission by his [supervisor]." 340 U.S. 462, 467 (1951). In *Touhy*, the Supreme Court recognized the validity of a Justice Department order – a predecessor to 28 C.F.R. 16.22(a) – which restricted the disclosure of information pursuant to the Housekeeping Statute, 5 U.S.C. 301, noting that "when one considers the variety of information contained in the files of any government department and the possibilities of harm from unrestricted disclosure in court, the usefulness, indeed the necessity, of centralizing determination[s] as to whether subpoenas duces tecum will be willingly obeyed or challenged is obvious." 340 U.S. at 468. Since *Touhy*, and consistent with authority under the Administrative Procedure Act, 5 U.S.C. 301, federal agencies have promulgated regulations that centralize decisions within the agency concerning responses by employees to subpoenas. DOJ's *Touhy* regulations are set out at 28 C.F.R. Part 16, Subpart B.

There is a general regulatory prohibition of production or disclosure of DOJ files where the United States is not a party. 28 C.F.R. 16.22. DOJ regulations state:

> In any federal or state case or matter in which the United States is not a party, no employee or former employee of the Department of Justice shall, in response to a demand, produce any material contained in the files of the Department, or disclose any information relating to or based upon material contained in the files of the Department, or disclose any information or produce any material acquired as part of the performance of that person's official duties or because of that person's official status without prior approval of the proper Departmental official.

28 C.F.R. 16.22(a).

Every attorney in DOJ in charge of any case or matter "in which the United States is a party" is "authorized" to reveal and furnish certain documents that the "attorney shall deem necessary or desirable to the discharge of the attorney's official duties," 28 C.F.R. 16.23(a), however, DOJ attorneys "shall not reveal or furnish any material [or] document * * * when, in the attorney's judgment, any of the factors specified in [Section] 16.26(b) exists." 28 C.F.R. 16.22(a). Section 16.26(b) sets out the considerations for determining whether to produce or disclose DOJ documents in response to a demand. Section 16.26(b)(5) explicitly prohibits disclosure of DOJ documents that would "reveal investigatory records compiled for law enforcement purposes, and would interfere with enforcement proceedings or disclose investigative techniques and procedures the effectiveness of which would thereby be impaired," unless the Deputy Attorney General or Associate Attorney General "determines that the administration of justice requires disclosure." 28

C.F.R. 16.26(c). In deciding whether to make disclosures pursuant to a demand, DOJ attorneys may also consider "[w]hether disclosure is appropriate under the relevant substantive law concerning privilege." 28 C.F.R. 16.26(a)(2). Where a demand is made for "information that was collected, assembled, or prepared in connection with litigation or an investigation supervised by a Division of this Department" and the component refuses to comply with the demand, the matter may be referred to the Deputy Attorney General or Associate Attorney General. 28 C.F.R. 16.22(d)(1)(iii). The regulations give the Deputy Attorney General or Associate Attorney General authority to make the final decision on disclosure. 28 C.F.R. 16.25.

The policy behind such prohibitions on disclosure of government files "is to conserve governmental resources where the United States is not a party to a suit, and to minimize governmental involvement in controversial matters unrelated to official business." *Boron Oil Co.* v. *Downie*, 873 F.2d 67, 70 (4th Cir. 1989). If federal officials are routinely compelled to disclose or produce government-produced documents in private civil actions where the United States is not even a party, "significant loss of manpower hours would predictably result and agency employees would be drawn from other important agency assignments." *Ibid.*

The Department's refusal to disclose the DOJ-created document reviewing the MPD's March 1996, shooting of Stevenson was not arbitrary or capricious because it fell directly within the scope of Section 16.26(b)(5), which prohibits disclosure of investigatory records compiled for law enforcement purposes. Indeed, in refusing to comply with the subpoena, counsel for the United States explained to counsel for Stevenson that DOJ's examination of the Stevenson incident is "preliminary and tentative" as it has not been reviewed by senior officials within the Department (Plt. Emerg. Mot., Exh. E, J.A. 86). Disclosure of the document sought by Stevenson, or any document pertaining to any other investigated incident of MPD's use of force, would impair the effectiveness of DOJ's investigatory processes because it would require preliminary disclosure of deliberative material prior to our making a final determination on whether MPD engages in a pattern or practice of unlawful conduct in violation of 42 U.S.C. 14141. Disclosure of this internal document would also impede DOJ's ability to gather further information from MPD regarding uses of force, and interfere with further analyses of these incidences due to the threat that the information can be immediately subpoened and utilized by third-parties in private civil litigation prior to DOJ even making a final determination on the results of its investigation or on

the results of a review of an individual shooting.

B. *The Department's Document Is Protected By The Deliberative Process And Law Enforcement Privileges*

Even applying the standard for reviewing motions for discovery under Fed. R. Civ. P. 26, DOJ's decision not to reveal the investigatory document was not arbitrary because it would be protected by the deliberative process and law enforcement privileges. While the United States did not formally assert these privileges in district court[4], these privileges are inherent in the regulations governing disclosure of DOJ documents, as the *Tuohy* regulations were intended to be "compatible with the exemptions from mandatory disclosure provided by the Freedom of Information and Privacy Act, 5 U.S.C. 552(b)." 45 Fed. Reg. 83,210 (Dec. 18, 1980); see also 5 U.S.C. 552(b)(5) (FOIPA provisions do not apply to "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency"); 5 U.S.C. 552(b)(7)(A) (FOIPA provisions do not apply to "records or information compiled for law enforcement purposes" where disclosure "could reasonably be expected to interfere with enforcement proceedings"). While the internal DOJ-document should not be disclosed based on prohibitions in the *Tuohy* regulations,

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[4] See p. 17 n.5, *infra*.

the deliberative process and law enforcement privileges, which are inherent in the *Tuohy* regulations, also support protection of the document.[5]

1. *Deliberative Process Privilege.*

The deliberative process privilege preceded FOIA, but was adopted as an exemption to disclosure, 5 U.S.C. 552(b)(5), and permits an agency to withhold materials normally privileged from discovery in civil litigation against the agency.

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[5] Fed. R. Civ. P. 45(c)(2)(B) gives a party 14 days after service to object to a subpoena. Because Stevenson's trial was scheduled within seven days of the issuance of the subpoena, DOJ was required to respond to the subpoena the day after its service on Mr. Rosenbaum. The United States informed Stevenson on April 27, 2000, that it would not comply with the subpoena (Plt. Emerg. Mot., Exh. E, J.A, 85-86). Stevenson filed his emergency motion to enforce subpoena two business days later, on May 1, 2000, and the district court held a hearing and entered an order on the emergency motion the following day, on May 2 (R. 125, J.A. 139, 168). The trial began on May 3, 2000. While there was insufficient time for the United States to assert privileges under the discovery rules, the protections afforded under these privileges are inherent in the *Tuohy* regulations. See 28 C.F.R. 16.26 (considerations in determining whether production or disclosure should be made include "[w]hether disclosure is appropriate under the relevant substantive law concerning privilege"); see also 45 Fed. Reg. 83,210 (Dec. 18, 1980) (DOJ's regulations "are intended to be compatible with the exemptions from mandatory disclosure provided by the Freedom of Information [and Privacy] Act, 5 U.S.C. 552(b)"). The United States could have properly raised these privileges, and satisfied the threshold requirements for doing so (see *Landry* v. *Fed. Deposit Ins. Agency*, 204 F.3d 1125, 1135 (D.C. Cir.), cert. denied, 121 S. Ct. 298 (2000)), through normal discovery rules that would have allowed the United States 14 days to respond to the subpoena. However, the circumstances of this case required the government to respond to the subpoena within 24 hours of its service on Mr. Rosenbaum.

See *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 148-149 (1975); *Tax Analysts* v. *I.R.S.*, 117 F.3d 607, 616 (D.C. Cir. 1997). The deliberative process privilege "allows the government to withhold documents and other materials that would reveal advisory opinions, recommendations, and other deliberations comprising part of a process by which governmental decisions and policies are formulated." *In re Sealed Case*, 116 F.3d 550, 557 (D.C. Cir. 1997) (internal quotations and citations omitted). The privilege originated "as a common law privilege." *Ibid.*; see also *Wolfe* v. *Dep't of Health and Human Servs.*, 839 F.2d 768, 776 (D.C. Cir. 1988) (en banc). The deliberative process privilege "shields only government materials which were both predecisional and deliberative." *Tax Analysts*, 117 F.3d at 616; *In re Sealed Case*, 116 F.3d at 557. These two requirements "stem from the privilege's 'ultimate purpose, [which] ... is to prevent injury to the quality of agency decisions' by allowing government officials freedom to deliberate alternative approaches in private." *Id.* at 558 (quoting *NLRB* v. *Sears*, 421 U.S. at 151 (1975)); see also *Dow Jones & Co.* v. *Dep't of Justice*, 917 F.2d 571, 573-574 (D.C. Cir. 1990) (This "ancient privilege" is "predicated on the recognition that the quality of administrative decision-making would be seriously undermined if agencies were forced to operate in a fishbowl."). A ruling that the privilege applies

"rest[s] fundamentally on the conclusion that, unless protected from public disclosure, information of that type would not flow freely within the agency." *Tax Analysts*, 117 F.3d at 617 (internal quotation and citation omitted).

The DOJ-created document sought in this case is indeed both predecisional and deliberative since it was created prior to the agency's final determination on the legality of MPD's uses of force, a determination DOJ has yet to make. Moreover, the document is not widely available within the agency. The document is maintained in a confidential investigatory file along with other attorney and expert evaluative documents assessing the legality of MPD's uses of force from 1994 to 1999.

This Court has observed that government documents created in "the process leading to decision to initiate, or to forego, prosecution is squarely within the scope of [the deliberative process] privilege." *Senate of the Commonwealth of Puerto Rico* v. *U.S. Dep't of Justice*, 823 F.2d 574, 585 (D.C. Cir. 1987). "To expose this process to public scrutiny would unnecessarily inhibit the prosecutor in the exercise of his traditionally broad discretion to assess the case and decide wether or not to file charges." *Ibid.* As counsel for the United States explained to the district court during the unsealed portion of the May 2, 2000, hearing, "I do not want to discuss

our analyses with counsel for the potential target of the lawsuit if we make a pattern or practice finding" (Tr. at 9 (May 2, 2000, a.m.), J.A. 147). Allowing for disclosure of this DOJ-created document, which contains brief, tentative conclusions by the agency's attorneys and experts in the context of an ongoing investigation of MPD, would unnecessarily inhibit DOJ's ability to analyze the legality of MPD's enforcement practices in the context of the 42 U.S.C. 14141 investigation.

Moreover, the DOJ document does not contain any additional factual information on the 1996 shooting of Stevenson (pp. 25-28, *infra*). The deliberative process privilege as applied in the context of FOIA "does not protect purely factual material appearing in ... documents in a form that is severable without comprising the private remainder of the documents." *Playboy Enters.* v. *Dep't of Justice*, 677 F.2d 931, 935 (D.C. Cir. 1982) (portion of report reflecting "advice, conclusions and recommendations [pertaining to a 1965 investigation into an informant] are protected from disclosure"). The DOJ-created document contains no new facts on the Stevenson shooting. In fact, the underlying facts supporting the document are taken solely from records that were provided to DOJ by MPD; the same records that MPD made available to Stevenson during discovery and prior to his trial. Thus

even applying the traditional standards for discovery, the document would be protected under the deliberative process privilege.

2. *Law Enforcement Privilege.*

The law enforcement privilege "may be asserted to protect testimony about, or other disclosure of the contents of law enforcement investigatory files." *In re Sealed Case*, 856 F.2d 268, 271 (D.C. Cir. 1998). The privilege is intended to protect not only the contents of investigatory files maintained by law enforcement offices, but also testimony about the information contained in such files. *Ibid.* ("It makes little sense to protect the actual files from disclosure while forcing the government to testify about their contents. The public interest in safeguarding the integrity of on-going civil and criminal investigations is the same in both situations.").

Reports are compiled for law enforcement purposes if they result from "investigations which focus directly on specifically alleged illegal acts, illegal acts of particular identified officials, acts which could, if proved, result in civil or criminal sanction." *Scheer* v. *U.S. Dep't of Justice*, 35 F. Supp. 2d 9, 13 (D.D.C. 1999) (citing *Rural Housing Alliance* v. *U.S. Dep't of Agric.*, 498 F.2d 73, 81 (D.C. Cir.1974)); see also *Kimberlin* v. *Dep't of Justice*, 139 F.3d 944, 947 (D.C. Cir.),

cert. denied, 525 U.S. 891 (1998) (stating that an OPR report developed in the course of an investigation "conducted in response to and focused upon a specific, potentially illegal release of information by a particular, identified official" was compiled for law enforcement purposes). DOJ's nondisclosed information was compiled for law enforcement purposes since the information was developed in the course of an investigation of MPD analyzing its uses of force over a five-year period to determine whether MPD engages in a pattern or practice of unlawful conduct in violation of federal law.

The law enforcement privilege is qualified, and the "public interest in nondisclosure must be balanced against the need of a particular litigant for access to the privileged information." *Tuite* v. *Henry*, 98 F.3d 1411, 1418 (D.C. Cir. 1996). Courts making this assessment consider numerous factors, including "whether the information sought is factual data or evaluative summary," "whether the police investigation has been completed," and "whether the information sought is available through other discovery or from other sources." *Id.* at 1417; *In re Sealed Case*, 856 F.2d at 272.

DOJ's refusal to disclose its internal documents would clearly fall within the privilege. DOJ's refusal was based on the fact that the information sought by

Stevenson constituted a law enforcement investigatory document that was created and is being maintained in the context of an ongoing investigation of MPD's uses of force pursuant to 42 U.S.C. 14141. The public interest favoring nondisclosure weighs against Stevenson's interest in disclosure for use in his civil proceeding against the MPD. First, the information that he seeks is not additional factual information about the 1996 shooting incident. Rather, the document constitutes evaluative information created by DOJ attorneys and experts. The evaluative information contained in the internal DOJ document was created based upon the factual information acquired from MPD and is the same information that MPD had provided to Stevenson prior to trial (see Tr. 8, 14-15 (May 2, 2000, a.m.), J.A. 146, 152-153).

Significantly, counsel for the MPD and for Stevenson both concede that the law enforcement investigatory privilege would protect material that constitutes the recommendations or opinions of the United States in its investigation of the shooting involving Stevenson, but that factual information would not be protected. At the May 2, 2000, hearing, the counsel for the District of Columbia stated:

> The District does have an additional consideration of the litigation in the matter before the Court, which is that it appears that plaintiff is seeking material which offer an opinion of the United States Department of Justice as to this matter. This does not appear to the District of Columbia to be

> admissible in any way. So even if the production were ordered of the United States Government, their opinion as to this shooting incident would not be admissible at trial. So it seems it's kind of a vain exercise.

See Tr. 10 (May 2, 2000, a.m.) (counsel for MPD), J.A. 148. Counsel for plaintiff-appellant Stevenson stated:

> * * * even if the documents at issue were protected by a deliberative process privilege or a law enforcement privilege, that privilege is not absolute. The factual findings in such documents would not be covered by the privilege. Anything that's protected by the privilege would merely be the material that would – that specific material that would interfere with a law enforcement proceeding or that particular part of the document that would indicate a recommendation as to what should be done in this case.

Tr. 12 (May 2, 2000, a.m.) (counsel for Stevenson), J.A. 150. Since the preponderance of information in the five-page DOJ-created document sought by the Stevenson subpoena constitutes factual information already disclosed to Stevenson by MPD, the only information in the document that Stevenson does not already have is the DOJ attorney's and expert's assessments on the legality of the shooting; information that, as Stevenson and MPD agree, is not discoverable.

Moreover, DOJ's investigation of MPD is not complete. Counsel for the United States explained at the May 2 hearing that DOJ has "not yet made a determination and ha[s] not drafted a final report in which [the Department] opine[s] on whether in [its] view there has been a pattern or practices of excessive

force by MPD officers" (Tr. 8 (May 2, 2000, a.m.), J.A. 146). In addition, Stevenson had all the factual information that DOJ had prior to his trial. As the district court found, the internal DOJ-document "[did] not identify any fact witnesses" (Order at 2 (May 2, 2000), J.A. 120), and all factual information relied on by DOJ in analyzing the March 6 incident involving Stevenson was that which had been provided to DOJ by MPD.

C. *The District Court Correctly Determined That The Document Would Not Lead To Additional Fact Witnesses*

The district court's order denying the subpoena was not arbitrary because the court correctly determined that disclosure would not lead to additional fact witnesses or admissible evidence. The Federal Rules of Civil Procedure permit parties to litigation to discover "relevant," "non-privileged" information that, even if not admissible, is "reasonably calculated to lead to the discovery of admissible evidence." Fed. R. Civ. P. 26; see also *Linder* v. *Dep't of Defense*, 133 F.3d 17, 24 (D.C. Cir. 1998). After an *in camera* review of the DOJ document, the district court ruled that it would not be disclosed because it "does not identify any fact witness or otherwise provide any lead to admissible evidence." This ruling is correct. The documents do not contain any additional factual information beyond that provided by MPD; and that underlying information was provided to Stevenson

directly by MPD.[6]

The names of experts and attorneys who analyzed the facts provided by MPD are not additional factual information that is discoverable. This Court, in *In re Sealed Case*, observed that the law enforcement investigatory privilege protects not only investigatory files, but also protects the government from testifying about the contents of these files. 856 F.2d at 271. Thus, under this rationale the law enforcement investigatory privilege would cover the experts and attorneys who analyzed MPD information to create the internal DOJ document assessing MPD's use of force against Stevenson. Also, Fed. R. Civ. P. 26 (b)(4)(B) limits discovery of facts known or opinions held by an expert

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[6] Stevenson (Br. 35) makes much of the district court's statement that he "can see a lot of dynamite here" (Tr. 18 (May 2, 2000, p.m.), J.A. 169). However, that statement is not solely in response to the district court's viewing of the internal document that DOJ seeks to protect from disclosure. The district court stated that the parties "had better work on it [a settlement] because [the court] can see a lot of dynamite here" (Tr. 18 (May 2, 2000, p.m.), J.A. 169). The district court stated further that: "The Department of Justice has made available to me what purports to be files made available to them by the District. And one thing leads to another. There is a list. There is an exhibit list which includes a number of exhibits which don't appear to be here" (Tr. 18 (May 2, 2000, p.m.) J.A. 169). Indeed, the district court's statement comes after its inquiry whether the parties have reached a settlement in the case, and its observation of material that had been provided to DOJ by MPD; material that the court subsequently ruled was discoverable, and that in fact was already in Stevenson's possession. The court's statement also appears to stem from its concern that items listed on the exhibit list had not yet been made available and the trial was scheduled to begin the following day.

> who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

Therefore the opinions of DOJ attorneys and experts sought by Stevenson's third-party subpoena of internal DOJ documents cannot be discovered because the opinions were formulated "in anticipation of litigation," as DOJ is investigating MPD and anticipates litigation against MPD should DOJ find a pattern or practice of unlawful conduct that violates 42 U.S.C. 14141. The opinions also are not discoverable unless Stevenson can show that it was "impracticable" to obtain expert opinions on the MPD's use of force by other means. Stevenson, however, cannot make this showing since he "tendered [his own] * * * expert witness" at trial (Stevenson Br. 12). See, *e.g.*, *Santos* v. *Rando Machine Corp.*, 151 F.R.D. 19 (D.R.I. 1993) (in employee's action brought against manufacturer and designer of machine that employee alleged caused his work-related injuries, Fed. R. Civ. P. 26(b)(4)(B) precluded taking of deposition of nontestifying expert, who was hired in anticipation of litigation by employer, a third-party defendant; employee had other means to obtain facts and opinions on design, manufacture, appearance and operation of machine at time of accident).

Because DOJ's internal document does not lead to additional factual witnesses or documentary evidence, and Stevenson already had all of the MPD information that was in DOJ's possession prior to his trial, the district court acted properly in refusing disclosure of the internal DOJ-created document.

CONCLUSION

For the foregoing reasons, the district court's May 2, 2000, order should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this final brief complies with the type-volume limitation set out in Fed. R. App. P. 32(a)(7)(B). The brief was prepared using WordPerfect 7.0, and contains 6,308 words.

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CERTIFICATE OF SERVICE

I hereby certify that on January 29, 2001, two copies of the Final Brief For The United States As Intervenor were served by first class mail, postage prepaid, on each of the following persons:

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